SUPREME COURT. U. S.

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No. 115

In the Supreme Court of the United States

OCTOBER TERM, 1961

ANTHONY PASSERO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a–16a) has not yet been reported. The opinion of the district court (Pet. 18a–27a; A. App. 111–120)[1] is reported at 185 F. Supp. 665.

JURISDICTION

The judgment of the court of appeals was entered on April 27, 1961. The petition for a writ of certiorari was filed on May 25, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "A. App." and "G. App." refer respectively to appellant's and the government's appendices in the court of appeals.

QUESTIONS PRESENTED

1. Whether the district court erred in denying petitioner's motion for a new trial on the ground of an inconsistency between the statement made in the complaint for petitioner's arrest and the testimony of the complainant at trial.

2. Whether the district court erred in its instructions on the weight to be given to character evidence.

STATEMENT

Petitioner was convicted in the United States District Court for the Eastern District of New York on four counts relating to two transactions in narcotics and was given concurrent sentences of six years' imprisonment on each count (A. App. 123–124). While the case was on appeal, the cause was remanded for consideration of a motion for a new trial. This motion was denied by the district court (A. App. 111–120). Thereafter, the denial of the motion for a new trial and the conviction were affirmed by the court of appeals (Pet. 1a–16a).

1. The evidence at the trial may be summarized as follows:

On August 15, agent Newkirk was introduced to petitioner at a bar by one Charlie Williams, a special employee (G. App. 127, 130). Petitioner agreed to sell Newkirk 2 ounces of heroin for $250 but said that he would deal only through Williams (G. App. 131–132). Newkirk gave the money to Williams who passed it to petitioner (G. App. 132). Petitioner told the men to go to a telephone booth at a gas station in Astoria and then left (G. App. 132). A short time later New-

kirk and Williams drove to the gas station where, under the shelf of the telephone booth, the agent found a package containing two cellophane bags taped to the bottom of the shelf (G. App. 133). The bags contained narcotics (see A. App. 52). Agents Dick and Fluhr saw agent Newkirk and Williams and later petitioner enter the bar, saw petitioner leave, and saw Newkirk in the telephone booth at the service station (G. App. 140–143; see A. App. 49–50).

On August 27, 1958, Newkirk and Williams met petitioner at a street corner in Queens. When they drove up, they saw petitioner and one Papa at the corner. Petitioner crossed the street and handed Newkirk a newspaper which contained two envelopes with a white powder, for which Newkirk paid $220 in government funds (G. App. 135–137). Later, Newkirk saw petitioner and Papa in a grey Cadillac (G. App. 137). That night Newkirk turned over to agent Dick the envelopes (G. App. 137), which were proved to contain narcotics (see A. App. 52).

At the trial, agent Dick testified that he saw petitioner and Papa together on the described street corner. He drove his car around, brought the car to a halt, and watched the two men for two or three minutes (A. App. 12). He then drove around again and, when he returned, saw petitioner and Papa enter a Cadillac (A. App. 13). On cross-examination, agent Dick testified that he did not see money or narcotics being passed from Newkirk to petitioner, but that he "observed merely the meeting" (A. App. 25).

2. Petitioner's motion for a new trial was based on discrepancies between the trial testimony of agent

Dick and his statements in a complaint for petitioner's arrest, sworn to in May 1959. In the complaint, agent Dick stated that petitioner and Papa sold heroin to William Newkirk on August 27, 1958, in violation of 21 U.S.C. 174. Agent Dick gave as the source of his knowledge the fact that Newkirk had reported that he had placed an order with petitioner and his own (agent Dick's) personal observations that he saw petitioner and Papa together on a described street corner; that he saw petitioner cross the street, meet Newkirk, hand Newkirk the package, and receive money; and that he then saw petitioner meet Papa and drive off in a gray Cadillac. Petitioner emphasized in his motion the discrepancy between agent Dick's affidavit that he saw the transfer and his testimony at the trial that he did not. Petitioner claimed that the failure of the prosecution to give the defense agent Dick's allegedly false complaint, so that the defense could impeach agent Dick's testimony at trial, tainted the whole of the government's case (A. App. 88–91, 92, 93).

Petitioner also contended in his motion that his arrest was illegal because it was based on the allegedly false affidavit of agent Dick and that therefore petitioner's statements made upon his arrest were not properly admissible in evidence (A. App. 93–94). Agent Dick testified at the trial that petitioner was arrested on the complaint after he had been seen on September 8, 1959, riding in a car with Miss Moore in

whose purse narcotics were found;[2] that petitioner had said when he was arrested that he was going to give himself up; that petitioner at first denied knowledge of the car; but that when agent Dick said that he knew that it was registered in the name of his brother and he was going to question the brother, petitioner said that he did not want to get his brother in trouble for something petitioner did, and subsequently led the agents to the car (see A. App. 14–16, 93–94).

The district court denied petitioner's motion for a new trial. As to the admissibility of petitioner's statements after his arrest, the court ruled that the arrest warrant was not invalid since agent Dick had probable cause based on his conversation with agent Newkirk without depending on agent Dick's own observations; that, in any event, the agents had probable cause to arrest without a warrant; and that, even if the arrest had been illegal, petitioner's statements would have been admissible since they were made voluntarily (A. App. 116). On the issue of agent Dick's testimony at trial, the court held that the principal witness as to the transactions on which petitioner was convicted was agent Newkirk, and that there was sufficient evidence without agent Dick's testi-

[2] Petitioner was acquitted by the court on the count arising out of the September 8 events on the ground that he was not shown to be connected with the narcotics found in Miss Moore's purse. Miss Moore was tried on the same count together with petitioner and her case went to the jury. The jury, however, disagreed (A. App. 76a).

mony to sustain the conviction; that petitioner claimed only that agent Dick's pre-trial complaint was false, not his testimony at trial, for the latter was much more favorable to petitioner; and that the evidence on which the motion for a new trial was based, *i.e.*, agent Dick's complaint, could have easily been discovered by the defense before trial (A. App. 117–119).

The court of appeals affirmed (Pet. 1a–14a). The court held that petitioner could not complain of the failure of the government to produce agent Dick's complaint since petitioner's lack of knowledge of the contents of this document was the result of his own counsel's negligence (Pet. 12). And the court further held that there was no basis for believing that the government had knowingly used perjured testimony merely because there was a single discrepancy in the statement made by a government witness (Pet. 13). The court concluded that "there has been no miscarriage of justice in this case; anything short of that does not justify making an exception to the salutary rule that parties may not later complain of their ignorance of what was in the court file and available to them at all times" (Pet. 14).

ARGUMENT

1. Petitioner's main contention (Pet. 11–19) is based on the discrepancies between the statements made by agent Dick in the complaint for petitioner's arrest and his testimony at the trial. He claims, first, that the government had the duty to disclose the allegedy false complaint, and that its failure to do so tainted the government's entire case (Pet. 11–17).

Second, petitioner contends that his arrest was invalid because based on the false complaint and that therefore his admissions, which were made immediately after his arrest, were improperly introduced into evidence (Pet. 17–19). These questions, which are fully discussed in the opinion below, turn on the particular facts of this case and present no issue of general importance. Moreover, the evaluation of these factual circumstances by the two courts below as not requiring a new trial is correct.

a. The government's failure to give agent Dick's complaint to petitioner's counsel is clearly not ground for reversal, for at least three reasons. First, as the court of appeals emphasized, the complaint was available to petitioner and his counsel because it was a public record in the court file in this very case (Pet. 11a–13a). In these circumstances, the government had no duty to call the complaint to the particular attention of defense counsel. While petitioner attempts (Pet. 14–16) to avoid his lack of diligence by suggesting that the government had knowledge of perjury and deliberately concealed it, the mere discrepancy between the two statements of agent Dick certainly does not substantiate this claim.[3]

[3] Agent Dick's testimony at the trial indicates that, although he did not observe the actual transfer of the narcotics and money, as the complaint states, he did observe the meeting of petitioner and Newkirk. The complaint was made almost a year after the events to which it related, the agents having apparently delayed arresting petitioner in order to try to get further evidence. Having seen the meeting, and having known what occurred from Newkirk, agent Dick's failure in the complaint to separate accurately what he saw from what he knew by hearsay, while unfortunate, is not incomprehensible.

Second, even aside from the fault of petitioner's counsel, a new trial was not warranted. The single discrepancy between agent Dick's statements in the complaint and his testimony at the trial does not have the significance which petitioner attempts to attach to it. Petitioner argues that, if he had been aware of the contents of the complaint at the time agent Dick testified, he could have impeached the credibility of Dick. This is not only speculative, but highly dubious. It is much more likely that comparison of agent Dick's statements in the complaint and at trial would have impressed the jury that agent Dick was attempting to be scrupulously honest in his trial testimony since, with respect to the only difference in the two descriptions, the trial testimony was slightly more favorable to petitioner.

Third, agent Dick's testimony was not the major evidence against petitioner upon either the two counts based on the August 15 transaction or the two counts based on the August 27 transaction.[4] Instead, the principal evidence as to both transactions was that of agent Newkirk, who directly participated in the events. His evidence was corroborated by the informer, Williams, who likewise participated. Petitioner's counsel himself recognized the comparative unimportance of agent Dick's testimony at the trial for in his summation he said (G. App. 162a): "If you take out Newkirk and Williams, you have nothing.

[4] Since petitioner was given concurrent sentences on all four counts, the judgment must of course be sustained if his conviction on any count is valid. *E.g.*, *Hirabayashi* v. *United States*, 320 U.S. 81, 85, 105; *Pinkerton* v. *United States*, 328 U.S. 640, 641–642, note 1.

Dick never saw anything take place." Like agent Fluhr, who testified as to the August 15 transaction, agent Dick was merely a corroborating witness who saw the transactions at a distance. The fact that at the trial agent Dick's testimony was more accurate than his statements in the complaint did not operate to petitioner's disadvantage.

b. As to the admissibility of the statements made by petitioner after his arrest, petitioner's lack of diligence in failing to present the facts at trial also bars this contention (see *supra,* p. 7). Moreover, petitioner's statements relate only to the car used in the September 8, 1959, transaction as to which petitioner was acquitted by the court. Petitioner, however, suggests that the jury considered these statements generally. But petitioner's counsel did not ask at the trial for an instruction that these admissions not be considered by the jury on the counts submitted to them; he merely pointed out to the jury in his summation that, in view of the acquittal, any testimony with respect to the September 8 incident had nothing to do with petitioner (G. App. 159). Thus, petitioner apparently considered his statement to the jury sufficient to ensure that the jury would not consider evidence relating to the September 8, 1959, transaction in its deliberations on counts regarding events which occurred in August 1958, over one year before.

In any event, petitioner's admissions made after his arrest were properly received in evidence. Regardless of the validity of the warrant of arrest, agent Dick had probable cause to arrest petitioner without a war-

rant on September 14, 1959, under 26 U.S.C. 7607.[5] The events of September 8, 1959 (which occurred after agent Dick's complaint had issued), while they were held by the trial court to be insufficient to show petitioner's guilt beyond a reasonable doubt, did, in the light of the agent's knowledge of petitioner's prior narcotics activities, constitute probable cause for his arrest. And since these events on September 8 occurred just a week before petitioner's arrest, there is no question of long delay.[6]

2. Petitioner also claims (Pet. 3, 19) that the court's instructions to the jury with regard to character evidence were erroneous. The judge charged the jury as follows (A. App. 67–68):

> Evidence of good character is not proof of innocence, although it may be sufficient, when considered in conjunction with all the evidence received at the trial, to raise a reasonable doubt. Therefore, in considering all of the evidence in the case, in determining the general question of guilt or innocence, testimony of this defendant's general character is to be given such weight as, under all the circumstances, you think it is entitled.

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[5] 26 U.S.C. 7607 authorizes narcotics agents to make arrests without warrants for violation of any narcotics laws "where such person has reasonable grounds to believe that the person to be arrested has committed * * * such violation."

[6] Moreover, the arrest, even if invalid, was not the proximate cause of petitioner's admission that he knew where the automobile was which he had been driving with Miss Moore on September 8. Petitioner led agent Dick to the car because Dick said that he intended to question petitioner's brother about it, and petitioner did not want his brother to get into trouble (A. App. 15–16).

Petitioner requested the court to charge that "character testimony may be such that it alone may create a reasonable doubt, although without it the other evidence may be convincing of guilt" (not included in the appendices below; see A. App. 72).

The treatment to be accorded character evidence was set forth in the leading case of *Edgington* v. *United States*, 164 U.S. 361, which held that it is error for the trial court to tell the jury to consider character evidence only when the scales are already in balance. This Court stated that (*id.* at 366):

> Whatever may have been said in some of the earlier cases, to the effect that evidence of the good character of the defendant is not to be considered unless the other evidence leaves the mind in doubt, the decided weight of authority now is that good character, when considered in connection with the other evidence in the case, may generate a reasonable doubt. The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although without it the other evidence would be convincing.

The Seventh and Tenth Circuits have read this language in *Edgington* to mean that the trial court is required to give an instruction that character evidence may raise a reasonable doubt. *E.g.*, *United States* v. *Donnelly*, 179 F. 2d 227 (C.A. 7); *Peterson* v. *United United States*, 268 F. 2d 87, 89 (C.A. 10). The majority of circuits (see *id.* at 89, note 3), however, have held that the trial court may properly instruct that the jury should consider the character evidence

in determining guilt or innocence, and need not state that character evidence may create a reasonable doubt. In this case, the trial court followed the rule in *Petersen* and *Donnelly* cases by stating that "[e]vidence of good character * * * may be sufficient * * * to raise a reasonable doubt" (A. App. 67–68).

The only possible conflict between the instruction given below and that prescribed by the Seventh and Tenth Circuits is that, while here the instruction did state that character evidence, considered with all the other evidence, may raise a reasonable doubt, the instruction did not say (as petitioner asked and the Seventh and Tenth Circuits have said) that character evidence *itself* or *alone* may create a reasonable doubt. But in all the Seventh and Tenth Circuit cases considering this issue, the trial courts had failed to instruct even that character evidence may raise a reasonable doubt. Thus, the circuits have not *held* that an instruction like that involved in this case is erroneous. The only possible conflict between the court below and the Seventh and Tenth Circuits is in the language but not the holdings of the opinions.

In any event, we submit that there is extremely little difference, if any, between the instruction prescribed in *Petersen* and *Donnelly,* and that given in this case. The important thing, common to all three instructions, is that the court inform the jury that character evidence can give rise to a reasonable doubt. Whatever difference there is between the two forms of instruction is not sufficient to justify review by this Court. Indeed, the Court has refused to grant writs of certiorari to resolve more signifi-

cant differences (though still slight) in instructions as to the weight to be given to character witnesses than the minor distinctions involved in this case. See *Moore* v. *United States,* 254 F. 2d 213 (C.A. 5), certiorari denied, 357 U.S. 926; *Poliafico* v. *United States,* 237 F. 2d 97 (C.A. 6), certiorari denied, 352 U.S. 1025.[7]

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[7] Petitioner also suggests (Pet. 3, 11), although he does not argue, that he was denied a fair trial by certain statements made by the prosecutor. As the court of appeals held (Pet. 14a–15a), the only statement which was conceivably improper was: "If you don't believe the agents you may just as well close the books on the prosecution of narcotics" (A. App. 64). The trial court, however, carefully instructed the jury that this statement was "inaccurate and improper" and should be ignored (A. App. 64).

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